Comments of Gary Myers
DP&L's Request for Approval of RFP
for Wind Generation RECs
PSC Dckt. No. 16-1031 (DP&L Filing on June 18, 2018)

For those of us who can remember phonograph records, I am the penultimate "broken" one. My single, repeating grove is "cost cap, cost cap, cost cap." So I beg your indulgence once more when I suggest here that the CommissIon must consider the restraints imposed by the REPSA cost cap provision (§ 354(j)) as it goes about reviewing DP&L's request to issue an RFP for renewable wind generation.

In sum, I think the cost cap restraint in 26 Del. C. § 354(j) imposes a limit on what amounts DP&L may be able to pay for wind-linked RECs (and any associated power). **At at minimum, the cost cap provision almost dictates that any new contract for wind generation RECs (and power) include an explicit term that the purchase commitments in the contract are subject to cancellation or modification in the event a freeze is declared under the § 354(j) cost cap provision.** This would provide a "belt and suspenders" notice to the wind generator that any contractual commitment with DP&L remains subject to the statutory cost cap's spending restraint.

But, in addition, the Commission should also consider - in light of the cost cap - exactly what prices can be paid for the RECs under any such wind contract. Subsection 354(j), by its text, imposes a limit on what amounts can be spent - or, more precisely, recovered from ratepayers - for REPSA's renewable energy requirements. Any such consideration necessarily entails applying the 3 per cent cap to estimates of future yearly dollar amounts of "the total retail cost of electricity for retail electricity suppliers." That resulting figure can then be used to provide insight into what amount can, in the future, be spent for wind generation RECs under the RFP contracts now being proposed.

The Probable Collision Course with the Cost Cap Provision

Back in 2016, DNREC determined that the non-Bloom Energy expenditures for "overall" RESPA compliance in the 2014-15 compliance year exceeded the 3 per cent cap level. DNREC said the compliance figure was 3.93 %. DNREC made a similar finding for the 2015-16 compliance year. The

expenditure percentage (excluding Bloom Energy payments) was 4.69 %, once again above the 3 per cent cap limit.

Using figures taken from DP&L's REPSA filing for the 2016-17 compliance year, one can pretty safely estimate that the (non-Bloom Energy) RESPA expenditures for that year once more came in above the 3 per cent cost cap ceiling. (*see* Exh. A attached). For the just-closed 2017-18 compliance year, no expenditure filings have yet been made. But unless there was a large drop in REPSA expenditure amounts or a significant increase in retail supply costs, one can foresee another above-cap compliance cost percentage emerging.

The above cap percentages for compliance costs are bound to grow to even larger numbers if the Commission's pending "cost cap" rules are finally adopted. Those new rules read § 354(j) - correctly - to: (1) include Bloom Energy payments as "costs of compliance" and (2) limit the "total retail cost of electricity for retail electricity suppliers" to only the supply portion of electric charges. By necessity, this expansion of the incremental compliance costs and the concurrent restriction of the comparative electric supply costs will drive the resulting percentage levels significantly higher. This, in turn, raises the real probability that - unless compliance costs are drastically reduced or supply side revenues greatly increase - a "freeze" in RESPA compliance looms large in the near future.

A Cost Cap Freeze is a Restraint on the Amount of Expenditures by DP&L for REPSA Compliance

There's been a lot of talk about the consequences of a "freeze" declaration. Everyone agrees that such a "freeze" defers an otherwise called-for increase in the yearly quota percentage for renewable linked generation. The subsection makes that clear. ("In the event of a freeze, the minimum cumulative percentage from eligible energy resources shall remain at the percentage for the year in which the freeze is instituted").

But the text of § 354(j) also says the cost cap limit has a more direct impact: it imposes a restraint on the amount of dollars that can be spent (and recovered from customers) for complying with the REPSA requirements in any particular compliance year. So § 354(j) (just as its solar companion § 354(i)) specifically says that once the cap percentage is breached and a freeze declared, such announcement "freeze[s] the minimum cumulative eligible

energy resources requirement for regulated utilities." In other words, a freeze lifts any obligation for DP&L to *further* comply with that year's REPSA requirement. And that means that no *further* monies can be spent, or recovered from ratepayers, for such truncated REPSA requirement. **The cost cap percentage limit imposes a ceiling on the amount of expenditures allowed in any compliance year.**

This is exactly how the cost cap scheme was explained to legislators by Senator McDowell and then-Secretary O'Mara when the provisions were enacted back in 2010. A breach of the cost cap percentage would trip the "circuit breaker" and "suspend the [utility's] participation in the program for one year;"[1] once there is a breach, the utility "do[esn't have to comply."[2] Or, as Secretary O'Mara said, once the cost cap level has been passed "*the target level freezes in place* for that entire calendar year."[3] After the program has been so suspended, DP&L has no authority to procure, and charge customers for, any further renewable compliance instruments for that year; there are no further REPSA compliance obligations for DP&L to adhere to. So as Secretary O'Mara explained, using the solar cost cap example:

> [y]ou'll *never* have more than a 1 percent impact in any given year for the solar, for the solar portion of the, of – the solar requirements as written in the legislation.[4]

The cost cap provision "caps" the total amount that can be spent on REPSA compliance during a particular compliance year.

The Wind Generation Contracts

So how does all of the above translate to the RFP for wind generation REC contracts? What it means is that these contracts themselves - both as to their contractual purchase commitments and the prices to be paid for RECs -

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1 Legislative Floor Proceedings on Senate Substitute No. 1 for Senate Bill No. 119, 145th Gen. Assembly, 2d Sess., *enacted as* 77 Del. Laws ch. 451 (2010), Senate Debate Tr. at 9 (Sen. McDowell) (June 22, 2010).

2 Senate Debate Tr. at 27 (Sen. McDowell).

3 House Debate Tr. at 13 (Sec. O'Mara) (June 29, 2010).

4 House Debate Tr. at 13-14 (Sec. O'Mara).

are subject to the statutory cost cap limitations. The RFPs and any resulting contracts must reflect that.

First, at a minimum, the proposed RFPs and any resulting contract for RECs (and related power) purchases should include provisions explicitly stating that the purchase commitments by DP&L are subject to cancellation or modification in the event that a cost cap "freeze" is declared under the statutory cost cap provision. The Commission can't approve a contract that would force DP&L into REC expenditures that a statutory cost cap "freeze" would bar, or make unnecessary. Contracts cannot override or supersede such statutory constraints, and this is particularly so when the limiting law predates the contract.[5] A specific provision in the RFP relating to the cost caps would alert any counter-party wind generator of the contingent nature of DP&L's obligation to purchase due to the cost cap limits imposed by Delaware law.

Second, before issuing the RPFs, there must be some consideration and analysis of what DP&L will be able to pay for such wind generation RECs (and associated power) in light of the cost cap ceilings and the persistent history of above-cap REPSA expenditures. The counter-party needs to be told what price ranges can be paid for the RECs being purchased. And the price range is surely impacted by the amount DP&L can spend for non-Bloom Energy RECs under the cost cap limit. Such analysis should include, as a starting point, some calculation of "the total retail cost of electricity" (as defined under the Commission's proposed cost cap rules) for future compliance years. From those figures one can determine what are the allowable amounts for renewable expenditures for each future compliance year. Then one can estimate and back-out the solar carve-out expenditures. From the remaining amount, Bloom Energy expenditures can then also be removed. The resulting figure reveals what DP&L can spend on non-Bloom Energy, non-solar, RECs. This is the "cap"on any cumulative prices to be paid in any future year under these proposed wind contracts.

It might be that once one does the above calculations, the pool of dollars left over for non-Bloom Energy, non-solar, REC purchases might not be very large. This would mean the cost cap limit would allow only small - or even no - purchases of wind generation RECs in any given year.[6] But that result simply is a consequence of the legislative decisions to: (1) cap REPSA expenditures at 3

5 *See, e.g.*, *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213 (1827) .

per cent of supply costs and (2) impose above-market Bloom Energy compliance costs on consumers.

Conclusion

In sum, I urge the Commission to be cautious in its review of DP&L's proposed wind generation REC RFPs. The Commission cannot solicit, nor approve, a contract that invariably will bring a conflict with the cost cap provision imposed by law. Approval of something that will end up violating existing law can never be in "the public interest." So too, already approved Exelon merger commitments still remain subject to now existing law - the cost cap provision. Before approving these RFPs, the Commission should assure itself that the RFP - and any resulting contracts - will not end up imposing compliance costs on DP&L customers that go beyond those allowed under § 354(j).

Respectfully submitted.

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6 Of course if solar compliance expenditures decreased, this would open up for more expenditures for non-Bloom Energy RECs. But so far, solar expenditures have hovered above, or just around, the separate solar cost cap limit.

Attachment A

OVERALL COST OF COMPLIANCE FOR COMPLIANCE YEAR 2016-17

Total Retail Costs of Electricity (TRCE) (ESTIMATED)		$ 750,644,107
Green Fund Non-Solar Rebate Amount (ESTIMATED)	$ 1,950,730	
SREC Cost of Compliance	8,434,115	
REC purchases	11,591,595	
"Net Energy" Wind Costs	13,193,676	
Total Overall Cost of Compliance (OCoC	**$ 35,170,116**	
3 % of TRCE (COST CAP LIMIT)		**$ 22,519,323**
OCoC/TRCE		**4.69 %**

TRCE estimated by using 2015-16 TRCE ($ 682,403,734) and adding additional 10% of that number for 2016-17 compliance year

Green Fund Solar and non-Solar Rebate Amounts Repeated from 2015-16 Compliance Year Figures